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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1936.

No. [redacted] 5

CHESTER C. DODGE, CATHERINE L. BAIRD, AZILE B. REYNOLDS, ET AL.,

Appellants,

vs.

BOARD OF EDUCATION OF THE CITY OF CHICAGO, ET AL.,

Appellees.

BRIEF IN OPPOSITION TO MOTION OF APPELLEES TO DISMISS OR AFFIRM.

ALLAN J. CARTER,
Counsel for Appellants.
189 West Madison Street,
Chicago, Illinois.

ALFRED R. BATES,
C. T. B. GOODSPEED,
KARL D. LOOS,
PRESTON B. KAVANAGH,
Of Counsel.

CHICAGO LAW PRINTING CO., 111 N. WACKER DRIVE (COR. WASHINGTON ST.) TEL. FRANKLIN 6321

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CHESTER C. DODGE, CATHERINE L. BAIRD, AZILE B. REYNOLDS, ET AL.,

Appellants,

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BOARD OF EDUCATION OF THE CITY OF CHICAGO, ET AL.,

Appellees.

BRIEF IN OPPOSITION TO MOTION OF APPELLEES TO DISMISS OR AFFIRM.

The appellees' motion to dismiss or affirm is confined to a statement of legal principles thought to be applicable, unsupported by argument or citations. The points made therein are argued at some length in the appellees' "Statement of Matters and Grounds making against Jurisdiction of the Supreme Court of the United States" and it will accordingly be necessary, in replying to the Motion, to notice the contentions made in that Statement.

The appellees, in opening their statement, press upon this Court certain alleged facts as tending to show the ex-

istence of an economic emergency which required the curtailment of the retirement annuities to which appellants had theretofore been entitled under the Miller Act of May 19, 1926. These are not germane to the constitutional issue. The amended Miller Act of July 12, 1935, which reduced the lifetime annuities of the appellants to $500.00 per year, does not purport to be an emergency economy measure nor is it limited in time and scope to the period of any emergency. It is a matter of common knowledge that by July, 1935 economic conditions had greatly improved.

Many of the assertions made in appellees' "Statement of the Case" are taken from their own allegations made in their answer to the bill of complaint. To this answer a replication (R. 172-186, Folios 230-244) was filed by plaintiffs (appellants) which placed the defendants on strict proof. The case proceeded to trial (R. 196, Folio 263) and testimony on behalf of plaintiffs (appellants) was introduced. The defendants (appellees) offered no testimony in support of their answer and may not now take advantage of its allegations. Such matters as the Reconstruction Finance Corporation loan of $22,500,000, mentioned by appellees, are not included in any portion of the record.

The case before this Court does not involve a test of any emergency powers of the State of Illinois.

The motion to dismiss or affirm, points 1 and 2, suggests that the State courts did not consider the Federal constitutional questions under the Fourteenth Amendment and Section 10 of Article I, but decided the case solely upon a point of local law. These conceptions of the decisions below are based upon the holding of the two Illinois Courts that appellants had no vested or contract rights which could have been impaired by the amended Miller Act of 1935.

It certainly cannot be contended that the Supreme Court of Illinois did not both notice and decide the constitutional questions raised by appellant (Opinion, R. 288, 290, 292-293).

The argument of appellees is substantially to the effect that, while the impairment occasioned by the amended Miller Act of 1935 is plain, the rights impaired were not vested and did not rise to the dignity of contract rights. In order to determine this question it was necessary for the Illinois Court to examine the legal effect of the original Miller Act of 1926 together with Section Three of the Miller Act added by the 1927 Amendment, and the position of appellants who had voluntarily retired, been retired or sought to retire under its provisions. Upon such an examination the Illinois courts upheld the appellees, but such a holding is not binding upon this Court and does not foreclose its inquiry into both the impairment and the nature of the rights impaired, where those rights were created by an earlier State statute and vested by appropriate action taken in reliance upon its provisions. The rule is well stated by Mr. Justice Miller in *New Jersey* vs. *Yard*, 95 U. S. 104, 113-114:

> "It may safely be said that in far the larger number of cases brought to this court under that clause of the Constitution, the question has been as to the existence and nature of the contract, and not the construction of the law which is supposed to impair it; and the greatest trouble we have had on this point has been in regard to what may be called legislative contracts,—contracts found in statute laws of the State, if they existed at all. It has become the established law of this court that a legislative enactment, in the ordinary form of a statute, may contain provisions which, when accepted as the basis of action by individuals or cor-

porations, become contracts between them and the State within the protection of the clause referred to of the Federal Constitution."

The case of *Coolidge* vs. *Long*, 282 U. S. 582, involved subsequent legislation of the State of Massachusetts which it was claimed impaired the obligation of a contract and took property without due process of law in violation of the Federal Constitution. In that case this Court in its opinion delivered by Mr. Justice Butler stated (p. 597):

"* * * this Court is bound to determine for itself whether there is a contract and to ascertain its true meaning and effect. That rule is necessary in order that this Court may properly enforce these provisions of the Constitution."

The most recent instance in which this Court has taken jurisdiction to determine the extent of contract rights created by statute and their impairment by subsequent legislation is in the cases of *Phelps* and *Askam* vs. *Board of Education*, Nos. 454, 455, October Term, 1936, which were argued during the week of February 1, 1937.

Appellees claim that the question is one of local law, not reviewable by this Court. There is no question but that the rights of appellants arose under a state statute. It is our contention that they vested when appellants had complied with all the provisions of the statute and had retired or become entitled to retire thereunder and were impaired by a subsequent Act of the State Legislature. Nevertheless, the construction of the rights claimed is a matter for the independent consideration of this Court. *Appleby* vs. *City of New York*, 271 U. S. 364, 379, 380. In that case this Court held:

"The questions we have here to determine are, first, was there a contract, second, what was its proper

> construction and effect, and, third, was its obligation impaired by subsequent legislation as enforced by the state court? These questions we must answer independently of the conclusion of that court. * * * It makes no difference what the answer to them involves, whether it turns on issues of general or purely local law, we cannot surrender the duty to exercise our own judgment."

Our right to such a consideration and construction inevitably follows from the presence of the constitutional questions which were raised and decided below.

In the alternative, appellees' motion to dismiss or affirm suggests the absence of a substantial Federal question and that such question (if present) has already been ruled upon by this Court (Alternative points 1 and 2).

Both contentions apparently rely upon the argument that appellants had no vested rights to what the original Miller Act describes as "annuities" "for life" (R. 72, 85).

We have no quarrel with the proposition that mere gratuities may be withdrawn at the will of the legislature, which is, in essence, the legal rule relied upon by appellees and which may be deemed well settled law.

We do contend that such a rule is not applicable here. In 1925 the Board of Education and Superintendent of Schools of Chicago recommended that a retirement age be fixed for teachers and principals at 70, in order to provide for the employment of younger persons (R. 73-77); that such retirement should apply to teachers and principals who, having served their probationary period, were occupying permanent appointments under the laws of the State (R. 76); and that the teachers and principals so retired should be compensated at the rate of $1500.00 per year for life by means of a "service annuity" (R. 75,

Folio 70). At the time the Miller Act was originally enacted, Section 138 of the school laws of Illinois applicable to the City of Chicago provided after a probationary period of three years that

> "appointments of teachers and principals shall become permanent, * * * subject to removal for cause."

This provision was enacted in 1917 and was not changed until the 1935 Legislature, by an amendment effective July 12, 1935, provided that such tenure shall also be "subject to termination by compulsory retirement at the age of 65 years" that age having been fixed by the Amended Miller Act as the age for compulsory retirement (R. 26, Folios 7 and 8, Ill. State Bar Stats. 1935, Chap. 122, par. 162, Sec. 138).

Pursuant to this recommendation the Legislature passed the Miller Act, effective May 19, 1926, entitled *"An Act to provide for the Compulsory Retirement of Teachers, Principals, District Superintendents and Assistant Superintendents, and the payment of retirement annuities"* (R. 71). This was amended June 24, 1927 to provide also for voluntary retirement beginning at age 65 (R. 84-86). By the Miller Act and its amendment the legislature intended to and did deprive a large number of appellants of their permanent teaching positions and in lieu thereof granted them in specific terms "annuities for life". Under this Act, 162 of appellants were compulsorily retired; 651 of appellants voluntarily retired upon their written requests for annuities; and the remaining 132 appellants, being qualified under the Act, filed their written requests for retirement, and were recommended for retirement by the Superintendent of Schools.

We submit that the Miller Act contained provisions which, when accepted as the basis of action by these teachers and principals, constituted contracts between them

and the State, within the protection of the contract clause of the Federal Constitution.

Appellees refer to an Illinois teachers pension Act of 1909 as being the only one which confers vested rights because, under it, contributions were made by the teachers to finance their own retirement.

This point is raised here for the first time. Not having been mentioned in the Courts below, it was not a consideration in their decision. If it is a vital element in the question of a contract right, this Court should pass upon it. We submit that the point lacks force because under the Miller Act the teachers renounced a lifetime guaranty of salary in the higher brackets paid to active teachers in exchange for a guaranteed life-long annuity at a fixed level very much lower. This change of position by the teachers constitutes sufficient consideration for their contract. *Schofield* vs. *Zion's Co-operative,* 85 Utah 281, 39 Pac. (2d) 342; *Psutka* vs. *Michigan Alkali Co.,* 274 Mich. 318, 264 N. W. 385; and see the language of the Court with respect to judges in *Retirement Board* vs. *McGovern,* 316 Pa. 161, 170, 174 Atl. 400, p. 405.

The applicable principle is thus stated in *Williston on Contracts* (1920), Vol. 1, Section 65, Page 115:

> "An offer for a unilateral contract generally requires an act on the part of the offeree to make a binding contract. This act is consideration for the promise contained in the offer and doing it with intent to accept without more will create a contract."

Applying this principle here, the State was the promisor and has received a legal benefit in the "long and faithful service" of these teachers and the teachers in turn have suffered a legal detriment in that, depending on the

promise of the annuity at the attainment of the required age and years of service, they gave up seeking employment elsewhere which might have been at higher active salaries. Those who retired voluntarily also gave up the right to continue teaching at the salaries they had then attained to. This constitutes valid consideration for the State's promise.

The Supreme Court of Illinois in the case of *Porter* vs. *Loehr*, 332 Ill. 353, p. 359, 163 N. E. 689, p. 691, decided in December, 1928, had held that retirement allowances were properly granted to policemen and that such a system was of benefit to the public "by encouraging competent and faithful employees to remain in the service and refrain from embarking in other vocations," and that this applied only to employees who were in the public service at the time such a pension system was established. That case was relied upon and approved by the Illinois Supreme Court in its decision in the case of *DeWolf* vs. *Bowley*, 355 Ill. 530, 189 N. E. 893, decided in 1934 sustaining retirement allowances to judges which were claimed in that case to be invalid under the State Constitution as the appropriation of public money to private use and as the allowance of extra compensation to public officers for services already performed.

Appellees quote from the case of *Lynch* vs. *United States*, 292 U. S. 571, page 577, a statement in the decision of this Court that pensions are gratuities. It is clear from the context in the same paragraph from which that quotation is taken that the pensions which the Court referred to were Federal pensions granted to members of the Army and Navy by an Act of Congress enacted after the completion of services. The sentence which immediately precedes the language quoted by appellees is as follows (p. 576):

> "War Risk Insurance, while resembling in benevolent purpose pensions, compensation allowances, hos-

pital and other privileges accorded to *former* members of the army and navy or their dependents, differs from them fundamentally in legal incidents." (Italics ours.)

We submit that the annuities granted by the Miller Act constitute contracts to the same extent that the War Risk policies constitute contracts. Immediately following the language quoted by appellees, this Court held, in the *Lynch* case:

> "On the other hand War Risk policies, being contracts, are property and create vested rights."

It is also our contention that the terms of appellants' contracts for life annuities are to be found in the Miller Act which was in force at the time of their retirements, the Superintendent of Schools having reported to the Board of Education the facts showing that they had in each case complied with all the requirements imposed by the statute, just as in the *Lynch* case the contracts of the veterans were to be found in the statutes providing for the War Risk insurance and also in the policies issued and regulations promulgated thereunder.

Appellees urge that this Court in the *Lynch* case, discussed above, and other cases involving pensions, has passed upon such pensions in a manner which forecloses the claims of the appellants.

The decisions of this Court in *United States* vs. *Teller*, 107 U. S. 64, *Frisbie* vs. *United States*, 157 U. S. 160, and the "pension" cases cited, included in appellees' quotations therefrom, and also those in their quotation from the *Lynch* case, in support of this contention, involve pensions granted by Acts of Congress to veterans of past wars whose services had ended before the passage of the Pension Acts involved. Counsel for appellees are careful to refer to the retirement allowances provided for by the Miller

Act as "pensions" and to the Miller Act itself as a "Pension Law." Nowhere in the Miller Act is the word "pensions" used in referring to the allowances provided by that Act, but those allowances are therein designated as "annuities" and it is therein provided that they should be paid for the "life" of the annuitants, and the amounts are definitely fixed in the Act. As pointed out in our Jurisdictional Statement filed in this case, the distinction between such retirement "annuities" provided for in the Miller Act and the gratuitous "pensions" is brought out by this Court in the recent case of *Dismuke* vs. *United States*, 297 U. S. 167. In that case, this Court held that the "annuities" provided for in the Federal Civil Service Retirement Law were not pensions and were not gratuities in the sense that the pensions paid by the Government "in recognition of past services in the Army or Navy" were gratuities.

Appellees rely upon the powers of a municipal corporation and its immunity as an agent of the State from liability for torts when engaged in performing strictly governmental functions, and cite and quote from three Illinois Supreme Court cases in support of their contention. These cases have nothing to do, we contend, with the power of the legislature to make a binding contract, or with the liability of a State to carry out its contractual obligations.

This Court in the case of *Ettor* vs. *Tacoma*, 228 U. S. 148, states the rule, which we contend applies to the case at bar, in the opinion delivered by Mr. Justice Lurton (p. 154) as follows:

> "The defense of the city that it was but the agent of the State in improving highways of the city, and therefore immune, because the State was immune, vanishes in the face of the fact that the State had abso-

lutely coupled authority in the matter with an obligation to make compensation. The city had no authority save that which came from the very act which imposed an obligation. It would seem to need no argument to establish the contention that the obligation to make compensation to these plaintiffs in error could not be destroyed by subsequent legislation."

The principle above set forth appears to us to also answer the contention of appellees based on the holding of this Court in the cases of *Atkin* vs. *Kansas,* 191 U. S. 207 and *Heim* vs. *McCall,* 239 U. S. 175.

We find nothing in the cases cited by the appellees which, when read in connection with the facts of the particular cases, would prevent this Court from finding the existence in this case of contracts and vested rights and an attempt at impairment of such contracts and such rights. As we have pointed out, the whole purpose of the Miller Act was to take away a right to permanent employment and to give compensation therefor in the shape of a permanent annuity. As to these appellants there was a contract which arose at the time of their retirement and which was impared by the Act of 1935 by which their annuities were reduced to a pittance.

CONCLUSION.

The determination of whether or not appellants possessed vested rights which have been impaired by Act of the Illinois Legislature, involves a substantial Federal question which was properly raised and was decided below. The answer to that question is of vital importance to 945 teachers and principals who are appellants in this cause. We submit that they have brought themselves within the jurisdictional provisions of Section 237 (a) of the Judicial Code and that this Court should hear and determine their claim of violation of their constitutional rights. It follows that the motion to dismiss or affirm should be denied.

Respectfully submitted,

ALLAN J. CARTER,
Counsel for Appellants.

ALFRED R. BATES,
C. T. B. GOODSPEED,
KARL D. LOOS,
PRESTON B. KAVANAGH,
Of Counsel.

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